

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN  
DISTRICT OF OKLAHOMA

**FILED**

MAR 01 2024

KENNETH H. TIBBETTS,  
Petitioner,

- VS -

DAVID ROGERS

Respondent.

CARMELITA REEDER SHINN, CLERK  
U.S. DIST. COURT, WESTERN DIST. OKLA.  
BY nda, DEPUTY

Case No. CIV-23-913-J

PETITIONER'S OBJECTION RESPONSE TO RESPONDENT'S PRE-ANSWER  
MOTION TO DISMISS PETITIONER'S PROTECTIVE MIXED HABEAS CORPUS  
PETITION FOR FAILURE TO EXHAUST STATE REMEDIES AND BASED  
ON THE YOUNGER ABSENCE DOCTRINE.

Comes now Petitioner, Kenneth H. Tibbets, appearing and proceeding  
pro se to submit Petitioner's Objection Response to the Respondent's pre-answer  
Motion To Dismiss.

Petitioner respectfully request this Honorable Court, deny the  
Respondent's Motion, grant Petitioner a Stay of this habeas proceeding, and  
Abatement of Petitioner's Protectionally filed mixed habeas Petition  
pending State remedy exhaustion, and a Leave to Amend the Mixed Petition  
after State remedy exhaustion satisfied, on the following good cause  
basis, grounds, reasons and authorities:

1. Petitioner pro se and pursuant to AEDPA, 28 USC. §§ 2244(d) and 2254,  
timely and properly filed in the Federal District Court a "Protectional Mixed  
Habeas Corpus Petition, requesting inter-alia the Court grant Petitioner a Stay  
Abeyance, until grounds 5, 6 and 7 exhausted, -- and any other relief to which  
Petitioner may be entitled, on 10/11/2023. See Hab. Pet. (DOC 1, at p. 1 and  
p. 25, at #18 (2), also see Resp. Mot. Dismiss. Br. In Supp. (DOC --- at p. 7 and n 5)  
Pace v. DiGuglielmo, 544 U.S. 408, 416 (2005); Rhines v. Webber 544 US 269

Notwithstanding, the liberal construction and reading of the Petitioner's protectionally filed mixed Habeas Petition, is entitled to by this Court, it sets forth in great and sufficient facts and information identifying and recounting:

(1) Habeas grounds, 1, 2, 3, and 4, exhausted, how, when, where and results.

See Hab-Pet. (DOC 1, at pp. 2-15 and p. 25 at #18), (evidence showing the Petitioner within 10 days of being sentenced, exercised due diligence to timely and properly initiate and prosecute his state law right of direct appeal, the time of its pendency and effects on the 28 USC § 2244(d) AEDPA, 1 year Statute of Limitations time period, tolling and run begin date); also See Resp. Mot Dism. Br. (DOC — at pp 3-4 — agreeing with Petitioner's AEDPA calculations, run initiation, but argues the Habeas grounds V, and VI unexhausted, due to theory, different or in stronger postures, than asserted on appeal. see pp 14-15)

(2) Habeas grounds, 5, 6 and 7 partially exhausted in state court how, when where and why, including results, inordinate delays by District Court, Court Clerk, depriving Petitioner of timely post conviction appeal, Petitioner Confusion about the state post-conviction appeal filing time frames, and its effects on Petitioner's AEDPA, § 2244 (d) 1 year statute of limitations time period remaining, its toll and calculations, and the status of the currently pending state post-conviction appeal out of time, ~~see~~ see Hab. Pet. (DOC 1, at pp. 15-25) Evidence the grounds potentially meritorious, the Petitioner exercise of due diligence within 153 days of the direct appeal denial, timely and properly raised the grounds in a pro se Post Conviction and was deprived of a timely appeal to the OCCA, by the Court Clerk errors, resulting in Petitioner current post conviction for appeal out-of-time proceeding, pending in the State District Court, that inordinately delayed the 1<sup>st</sup> post conviction proceeding for <sup>4 years, 14 months</sup> ~~30 days~~, leaving Petitioner unable to know how long the ~~proceeding was pending~~ ~~that the Petitioner's knowledge of the time period~~ ~~was not that the court clerk~~

appeal-out-of-time proceedings would be pending nor the result of of the proceeding, while under the Habeas Petition form noting, such a state a State proceeding does not qualify to toll Petitioner's remaining 207

days of AEDPA time to file Habeas Petition in Federal Court, see Hab Pet Id at p. 25-26 \*. Duncan v Walker, 533 U.S. 167, 181-82 (2001)

Resp. Mot. Dismiss Br. (Doc at pp. 18-19, argue there is no confusion over or about the filing times of the Post Conviction Appeal. Id at 19 OCCA Rule 5.2(c) controls over the Post Conviction Act, statutory, statute of limitations time to file in the OCCA, and acknowledges, Petitioner due diligence filing of the 1<sup>st</sup> Post Conviction. the inordinate delays of the trial Court to proceed, until Petitioner filed a mandamus writ petition in the OCCA to compel the District Court proceed, citing its Excs) 16 - 17, 19; further Respondent agrees with Petitioner, denial result, his timely and proper Notice of Post Conviction filing in the District Court, the attempted appeal declined, the filing of the Appeal out of time post-conviction, the Court and Clerk at fault, the OCCA granting and the Petitioner filing the currently pending Post Conviction appeal, citing to its Excs) 22-36, to argue the time remaining to file would be 105 days, the grounds without merit or omitted from the appeal, and Younger, applies, at pp 19, 24 and Petitioner fails his burden of showing good cause for a Stay / Abeyance. Id at pp 16 - 24,

Petitioner in objecting to Respondents Mot To Dismiss. First argues to this Court, its denial of a Stay and Abeyance to which this Petitioner timely and properly sought on 10/11/23, would result in Petitioner, having only 4 days of AEDPA time to refile, if any time now remains, because neither the Habeas in Federal Court or the post conviction, for out-of-time appeal, tolls the run of the AEDPA, 1 year time period.

See, 28 USC § 2244 (d); See Dodds v. Nunn, not reported in F. Supp. 2021 WL 2954002 E.D. Okla. at \* — citing Duncan v. Walker, 533 U.S. 167, 181-82, 121 S. Ct. 2121 (2001)

At the time Petitioner, filed the protectional mixed Habeas Petition, he was

legitimately confused about the state post conviction filing times, and its effects impacts on Petitioner's remaining AEDPA, § 2244(d), time period to file his Habeas Petition, in this Federal District Court, and was without any knowledge of how long his then pending in State District Court, post conviction, for appeal out of time of the District Courts post conviction denial order. See Heb. Pet. Id. The Resp. Mot Dism Br. (DOC at 18-19, makes the beyond civil arguments, of the after the fact, of the Petitioner's Habeas Petition filings, actions of the State District Court, OCCA, and Petitioner, filings of recommendation to OCCA, its granting and post conviction appeal filings, impacts on Petitioner's remaining AEDPA time period, to argue there purportedly is 105 days remaining to file in Federal Court.

To the contrary, Petitioner, Respondent nor this Court, had any knowledge or means to know, how much AEDPA time period the Petitioner would have remaining, to file in this Court, when the Petitioner filed the protective Habeas Petition, nor any tollings, that might occur, prior to the expiration of Petitioner's AEDPA time remaining, simply put, Petitioner established good cause for not exhausting Habeas grounds 5, 6 and 7, and for filing the protective mixed Habeas Petition, requesting stay and Abeyance, on 10/11/23. Pace, 544 U.S. at 276-79;

In fact, the Petitioner, shows the Court, that U.S. District Courts for the Districts of Oklahoma, have on facts and evidence, like those in this case, as set forth above, have, even in the absence of a protective filing of a mixed habeas Petition, or a Stay/Abeyance request, held, the Petitioner met the good cause burden for the failure to exhaust, had not engaged in dilatory litigation tactics, and the grounds, potentially meritorious. See Harris v. Quick, E.D. OKla 2023 WL 2258304 (Stay granted pending exhaustion); Mason v. OKla, W.D. OKla, N. Reported in Fed Supp. 2022 WL 17491328 (Court without Stay request sua sponte Conduct Rhines analysis, for a stay). Fitzer v. Whitten, E.D. OKla, not reported

in Fed Supp. 2019 WL 409,373<sup>4</sup> (stay granted on Protectional Habeas Petition, without explanation from Petitioner for its filing while initial Post Conviction pending)  
Belcher v. Bragg, N.D. Okla 2018 WL 4305728 (stay granted)

Amazingly, the Respondents Mot Dismiss Br. (DOC at p 19-20) argues the unexhausted Habeas Petition grounds 5, 6 and 7 are meritless, citing as its evidence in support, Excs (Doc 1, and post-conviction decision of the District Court, denying Post Conviction Relief, State Post Conviction Response, Petitioner's currently pending Post Conviction Appeal. To the contrary, Petitioner is a Indian, an enrolled member of Osage-federally recognized tribe, who committed Major crime Act offenses, in Indian country, that claimed the State Court Lacked jurisdiction to prosecute, convict and punish Petitioner, that trial and Appellate Counsel was ineffective, in relation to that "Lack of jurisdiction ground and for other reasons, prior to the McGirt v. Oklahoma, litigation, the State District Court, did not find the claims plainly without merit, and the OCCA, continues to review, the Lack of jurisdiction portion of the claim on appeal, for 2 months and counting, thereby evidencing the appellate grounds potentially meritorious, rather than plainly meritless, nor is it procedurally barred, in State Court.

The U.S. Supreme Court, determined under some circumstances, a petitioner, in light of the AEDPA, 28 USC § 2244(d), 1 year statute of limitations, and § 2254(b) exhaustion, of available state remedies, is entitled to file a protective Habeas Corpus Petition in a federal District Court and request a stay and abeyance, notwithstanding, the Petitioner's failure to exhaust fully available state remedies on the claims in the Habeas Petition, in Pece v. Di Guglielmo, 544 U.S. 408, 416 (2005) (citing Rhines v. Webber, 544 U.S. 269, 278, 125 S.Ct. (2005)). See Souza v Massachusetts, U.S. District Court, D. Massachusetts, 2024 WL 583510 at \*1 ("... a habeas petitioner who is concerned about the possible effects of his state post-conviction.



filing on the one year limitations period on habeas [§ 2244(d)(1)(A)-(D)] can file a "protective" petition in Federal Court and then ask for the petition to be held in abeyance pending the exhaustion of state post-conviction remedies. citing *Pace v DiGiulielmo*, 544 U.S. 408, 416 (2005) (citing *Rhines v. Webber*, 544 U.S. 269, 278 (2005))

With respect to the stay and abeyance, in the context of a mixed habeas petition, and AEDPA, 28 USC § 2244(d), 1 year statute of limitation period and the § 2254(B), ~~and~~ exhaustion of available state remedies prior to filing a habeas petition in Federal Court, the U.S. Supreme Court in *Rhines v. Webber* 544 U.S. 269, 279 (2005) acknowledge the interaction, recognized gravity of two risks is created, and sanctioned the stay-and-abeyance procedure... in which the Federal District Courts, have a broad, but not unlimited discretion, to decide whether a stay is warranted given the specific circumstances of the case. *Id.* at 275-78. The Court, held " [G]ranting a stay... is only appropriate when the District Court determines there was good cause for the petitioner's failure to exhaust his claims first in State Court " *Id.* at 277. The Court stated, if a petitioner engages in abusive litigation tactics or intentional delay, the District Court should not grant him a stay at all. On the other hand, it likely would be an abuse of discretion for a district court to deny a stay and dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics. In such circumstances, the District Court should stay rather than dismiss, the mixed petition, citing *Lundy v. Rose*, 445 U.S. 522 (1982) (total exhaustion requirement was not intended to "unreasonably impair the prisoner's right to relief.") *Id.* at 278. See also *Doe v. Jones*, 762 F.3d 1174, 1176-79, 1181-82 (10th Cir. 2014) and *Belcher v. Jones*, U.S. District Court, N.D. Okla., Not Reported in Fed. Supp. 2018 WL 430 5798, at \*3-5, (citing *Rhines v. Webber* 544 U.S. 269 (2005), and *Doe v. Jones*, 762 F.3d 1174 (10th Cir.

filed in the District Court, the Notice of Appeal on 4/1/23, the Court Clerk and Court, in a bad faith effort to prevent Petitioner timely appeal of the 3/1/23 denial order, withheld the filing date of the Notice from Petitioner, thereby leaving Petitioner unable to timely perfect a proper appeal in the OCCA, and Petitioner was legitimately confused over the valid due dates, in 22 U.S.C. 1007 and conflicting OCCA R. 5.2.(c) time frames. See Hab Pet. Nevertheless Petitioner sought on 1/1, an extension of time to file appeal in the OCCA, from the OCCA, and on 1/1/23 the OCCA clerk declined the filing; Petitioner's 1/1 Post Conviction Appeal in the OCCA, was declined by the OCCA on 1/1, within days of the OCCA declining jurisdiction of the Post Conviction Appeal, the Petitioner on 1/1 timely and properly filed press a Post Conviction for Appeal out-of-time of the post conviction denial order, in the District Court, faulting the Clerk, for depriving Petitioner of the appeal to the OCCA, this type post conviction filing and proceedings, having no tolling effects on

2014), granting stay and abeyance of the protectively filed, mixed Habeas Petition, pending exhaustion, of state remedy, pending state post-conviction finding good cause shown of Petitioner confusion over state filing times, and short time remaining of AEDPA, statute of limitation period, to refile, if the stay denied and Habeas Petition dismissed.)

Under the above cases, facts, evidence and circumstances of this case the Petitioner, has satisfied all 3 of the Rhines factors, see Page 14, entitling Petitioner, to the requested stay and Abeyance relief, in his Hab Pet (DOC 1, p. 26,) and the denial of the Respondents Mot. Dism. (DOC — )

Petitioner, if stay/abeyance granted, Motions For Leave to Amend the currently pending mixed habeas Petition, grounds 1, 2, 3, 4, 5, 6 and 7, to assert only total exhausted claims, based on the same theory, and in same strengths, presented in the State Courts, pursuant to FRCP 15; 28 USC § 2254 (B) see Demarest v. Price, 130 F.3d 923 929-30 (10<sup>th</sup> 1997); also see Resp-Mot, Dism. Br. Supp. (DOC — at pp 9-10, complaining of theory and strength differences, rendering the Hab. grounds, unexhausted in state courts.)

Petitioner objects to Resp. Mot Dism and Br. (DOC — and —, PP contentions and argument of Younger v. Harris, 401 U.S. 37 (1971), warrants this Court Abstain, and dismiss Petitioner's protectional mixed Habeas Petition, because of the ongoing state post conviction appeal proceeding in the OCCA to exhaust, the unexhausted Hab ground V - citing its Exs 34-36, and Petitioner failure argue or plead facts, establishing Younger, docs, not Abstain this Courts granting the stay/Abeyance relief sought, citing purported authorities supporting, its Mot. Dism. request.

Petitioner objection, need not tarry long in arguing that in the particular facts of Petitioner filing a protective mixed Habeas Petition,



in Federal Court, while attempting to totally exhaust, the unexhausted claims in a on going state post conviction proceeding, and seeking the federal Court, on good causes, to stay and Abate the proceeding and Petition, pending the exhaustion of the unexhausted claims. Rhines v. Webber 544 U.S. 276 (2005) also see Pece 544 US 408. id. preempts the Younger, Abstaining.

Additionally the unpublished authority cited by Resp. Br. where Younger abstaining doctrine was applied to Federal Habeas cases, in which there was on going state court proceedings on unexhausted Hab. Pet. claims, those cases, show no protectional Habeas Petition filing, nor any stay or abeyance requested, moreover, those Petitioner filed no objections to the application of Younger, to Dismiss the Habeas Petition. See Br. p. 25, citing Sampson v Okla., Green v Whatse, and Klinger v Bridges, all other cases cited are in context of 42 USC. § 1983 civil cases.

In whatever context, the cases, cited and relied on by Resp. Br. pp. 24-25, regarding Younger doctrine, they are inapposite to and apply not to the context of the Petitioner's case. Accordingly no Younger bases exist, to grant Respondent's Mot to Dismiss Petitioner's Hab Pet. (DOC 1). and Petitioner request the Court, deny Resp. Mot. Dismiss based on Younger.

### CONCLUSION

Petitioner in the protectively filed mixed Habeas Petition, (DOC 1), although pro se, did in details allege sufficient facts and information, showing the good cause reasons for not only his failure to totally exhaust, Habeas grounds, 5, 6 and 7, potentially meritorious claims in on-going state court proceedings, but also for the protectional Habeas filings, in a timely manner, and there was nothing indicating Petitioner had engaged in any dilatory litigation tactics, and requested relief granting a stay and abeyance pending exhaustion of grounds 5, 6 and 7 and any other relief to which Petitioner may be entitled, satisfying ~~noted~~ the Pece / Rhines elements, entitling Petitioner to a stay and abeyance requested, in the Hab Pet id at p. 26. The Courts denial and dismissal will irreparably impair Petitioner right to refile a timely Habeas, upon exhaustion. Fitzer id at ¶ 3.

For the foregoing reasons Petitioner respectfully request this Court deny Respondents' Motion To Dismiss (DOC - ) in all of its aspects and exercise its discretion, to grant Petitioner the Stay and Abeyance relief requested herein and in the pending Hab. Pet (DOC 1 at p. 22) for good causes shown under Pace and Rhines id.

All PREMISES CONSIDERED, on this 16<sup>th</sup> day of Feb. 2024,  
and Respectfully submitted by: Kenneth H. Tibbetts, Petitioner  
Kenneth H. Tibbetts,  
Joseph Harp Corr. Ctr.  
P.O. Box 588.  
Lexington, Okla. 73051

CERTIFICATE OF SERVICE

I Kenneth, H Tibbetts, the undersigned mailer person, hereby certify pursuant to 28 U.S.C. § 1746, that on this 20<sup>th</sup> day of Feb, 2023, I have pre-paid sufficient 1st class postage, reboxing services, and delivered the original Objection, to the JHCC law library Supervisor, for mailing original and copies to the below addressees:

~~U.S. District Court,~~

~~Western District of Okla~~

William J. Holloway, Jr.  
U.S. Courthouse  
200 N.W. 4th Street, Suite 1210  
OKC, OKla. 73102

Oklahoma State Attorney General  
c/o Asst Atty Tessa L. Henry  
313 N.E. 21st Street  
OKC, OKla 73105

1/s/ Kenneth H. Tibbetts  
mailer